

Office-Supreme Court, U.S.

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SEP 3 1983

ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

CAVE HARDIN and
CECIL HARDIN - - - - - Petitioners

DETAINS

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

EDWARD C. AIRHART

Suite 200, 440 South Seventh Street
Louisville, Kentucky 40203
(502) 587-0789

Attorney for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether Petitioners' rights under the Fourth Amendment search and seizure clause and under the Fourteenth Amendment's due process clause were violated by the issuance of search warrants based upon information contained in Affidavits which was "stale" instead of being "timely" in nature.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. _____

CAVE HARDIN and
CECIL HARDIN - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY**

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered in this case on July 6, 1983.

OPINIONS BELOW

The opinion and order of the Supreme Court of Kentucky is unreported and set forth in the appendix A herein. The order denying the motion for leave to file a motion for reconsideration is unreported and set forth in the Appendix B.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on July 6, 1983. Motion for leave to file motion for reconsideration was denied August 2, 1983. The jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 12, 1980, Detective Vince Noble of the Kentucky State Police, began an investigation into allegations filed on June 28, 1980, that Petitioner, Cecil Hardin, had been involved in illegal gambling

activities in Jefferson County, Kentucky. Detective Noble concluded his investigation on December 5, 1980, but it was not until some two and one-half months later, on February 19, 1981, that Petitioners, Cave and Cecil Hardin, along with Co-Defendant, Dale Meredith, were indicted by the Jefferson County Grand Jury on charges of conspiracy to promote gambling, in violation of KRS 528.040, and with promoting gambling in the second degree, in violation of KRS 528.030. (Appendix C) On February 20, 1981, after the indictment was returned and based upon information received from Detective Noble, Detective M. Ballard of the Louisville Police Department filed affidavits (Appendix D and E) and secured search warrants for 2422 West Market Street, a tavern, and 2420 West Market Street, a private residence, both located in Louisville, Kentucky.

A subsequent search of the above stated premises resulted in the confiscation of a set of poker chips, a deck of cards, a "shoe" from which cards are dealt, a card table, and a gray poster imprinted with rules for playing the game of blackjack.

A motion to suppress these items from being introduced into evidence was made, and a hearing was held in Jefferson Circuit Court on April 8, 1981. (Appendix F)

The grounds for the motion was that the search warrants had been issued based upon "stale" information, two and one-half months having elapsed between the end of Detective Noble's investigation and the issuance of the warrants, thereby violating the case law inter-

pretation of the Fourth Amendment requiring that the probable cause upon which search warrants may issue must be "timely" in nature.

Petitioners' motion was denied, the seized items were introduced into evidence and on April 9, 1981, the jury found Petitioners and Co-Defendant, Meredith, not guilty of the conspiracy charges (Meredith was also found not guilty of the promoting gambling charge), but Petitioners were found guilty of promoting gambling in the second degree with the recommendation being a FIVE HUNDRED DOLLAR (\$500.00) fine. (Appendix G)

On April 14, 1981, Petitioners filed a motion for a new trial based upon the introduction of the seized items into evidence in violation of Petitioners' previously stated Fourth Amendment right, and that the fine recommended was excessive.

Said motion was overruled on May 22, 1981, and Petitioners were ordered to pay a FIVE HUNDRED DOLLAR (\$500.00) fine which was suspended, conditioned upon good behavior for a period of two years. Whereupon Petitioners filed their appeal with the Kentucky Court of Appeals on June 2, 1981. (Appendix H)

In their appeal, Petitioners argued that the search warrants in the case were invalid due to their issuance being based upon the use of "stale" and not "timely" information so as to violate the Fourth Amendment's probable cause requirement for the issuance of search warrants.

In affirming Petitioners' convictions, the Court of Appeals held that "courts will invalidate a search warrant only if there is a showing that an unreasonable amount of time has elapsed between the time the alleged activity has occurred and the time the Affidavits and search warrants were issued. (Appendix I) What constitutes a reasonable amount of time, according to the decision, varies from situation to situation. In the view of the Appellate Court, the activity mentioned in the affidavits for the search warrants had been continuous, not isolated in nature thereby negating any claim of an unreasonable passage of time between the alleged activity and issuance of the warrants.

Petitioners proceeded to file a motion for discretionary review before the Kentucky Supreme Court on the same Fourth Amendment ground as stated at the Circuit Court and Court of Appeals level.

The motion was granted and by way of a split decision entered July 6, 1983, with one justice not sitting, the Kentucky Supreme Court upheld the decision of the Kentucky Court of Appeals. (Appendix A and I)

ARGUMENT

The Trial Court Erred when It Overruled the Petitioners' Motion to Suppress the Evidence Seized as a Result of the Search Warrant Because the Searches Were Rendered Unlawful and Void by Reason of a Lapse of Seventy-Seven Days from the Date the Information was Secured Until the Affidavits Were Made and the Search Warrants Issued.

The Petitioners contend that in order for a search to be valid, both the search warrant and the affidavit in support of the search warrant must show that there was probable cause to believe that a crime was being committed at the time the search warrant was issued. Further that after a reasonable time, the information obtained must be supported by facts showing a present probable cause upon which the search warrant could have been issued. In other words, from the time the alleged act occurred until the time the search warrant was issued, the facts which may have constituted probable cause at the time it was committed, must be closely related in time to the time in which the search warrant was obtained. Otherwise these facts become stale, resulting in a lack of probable cause.

It is imperative that a close examination be made of the facts and circumstances set out in the affidavit to determine if probable cause was present at the time the search warrant was issued. *Sgro v. United States*, 287 U. S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932). The court must consider the nature of the activity involved, the length of time the activity existed, the nature of the property to be seized and the place to be searched

to determine if there was present probable cause at the time the search warrant was issued. See *United States v. Johnson*, 461 F. 2d 285, 287 (10th Circuit, 1972), *United States v. McGrath*, 622 F. 2d 36, 42 (2nd Circuit, 1980).

It is also necessary to review the two warrants separate from one another, since each warrant involves different factual situations and locations.

The first warrant called for the search of 2422 West Market Street, Louisville, Kentucky, which consisted of a two-story brick building containing a tavern on the first floor and apartments on the second floor.

The affidavit upon which the search warrant for this location was issued was based on two separate acts occurring on two different dates. The first act occurred on November 14, 1980, when Det. Noble was taken to a second floor apartment at 2422 West Market Street, the premises later searched, supposedly instructed in how to play a dice game known as "craps" and was simply informed that *such a game may take place at the same location at some future date* (emphasis added, see Appendix D).

The second act occurred when Det. Noble informed Det. Ballard that on December 5, 1980, a token (a chance on a case of beer) was given to the undercover police detective as the result of a score achieved on a bowling machine (see Appendix D). The search warrant for the apartment and the tavern at 2422 West Market Street was issued on February 20, 1981, some *three months after the visit by Det. Noble to the second floor apartment and some 77 days after the alleged*

receipt of a token for a chance on a case of beer in the tavern (emphasis added).

Petitioners submit that applying "everyday common sense" to the above stated facts can only lead one to conclude that probable cause was never present. If, however, probable cause ever existed, the passage of unreasonable time between the occurrence of those events and the issuance of the warrants rendered the search null and void for lack of probable cause. It is inconceivable that probable cause could be found based on the statement of a "future crap game" and "a chance on a case of beer"

That there was no probable cause to search the upstairs becomes apparent when one considers the nature of the activity (a future crap game), the length of time the activity has existed (no reference as to any prior games having been played), the nature of the property to be seized (a highly mobile pair of dice) and the place to be searched (a private apartment—an area where the general public is not allowed to intrude for the purpose of inquiring as to whether or not a potential crap game is taking place).

Applying the same factors to the first floor search of the tavern it is obvious once again there is no evidence of present probable cause. In looking at the nature of the activity (a token for a chance on a case of beer), the length of time the activity existed (none), the nature of the property to be seized (a token?) and the place to be searched (a tavern), it is obvious that, if this was an ongoing activity any investigator could have walked in, obtained another token and arrested

everybody and conducted a lawful search at that time. It is obvious that the activity had ceased and that the information obtained was stale. Thus, the search warrant lacked probable cause.

The second search warrant in question was issued for 2420 West Market Street, Louisville, Kentucky, and was described as a one-story dwelling, a private residence. In the supporting affidavit (see Appendix E), Det. Ballard stated that he had been informed by Det. Noble that Det. Noble had witnessed and participated in the game of blackjack on several different dates between October 25, 1980, and December 5, 1980. It should be noted that no reference is made as to whether anything of a monetary value was wagered, nor were the dates and times set out. The affidavit simply alleges several different dates. Is this to be interpreted as meaning more than one or more than two and if so when? It is respectfully submitted that the magistrate cannot interpret and read into the affidavit something which is not stated. One can only speculate that several blackjack games occurred during this period, that something of monetary value was wagered and that the December 5, 1980, date refers to the date in which a token was obtained for a chance on a case of beer in the tavern, *which is totally unrelated to the residence*. This type of speculation is not permitted and thus it becomes apparent that there is no present probable cause.

The elapsed period between the blackjack games and the obtaining of a search warrant is unknown. However, at least 77 days lapsed between December 5,

1980, and February 20, 1981, the date a search warrant was obtained. The Petitioners submit that the affidavit is so vague as to the time of the alleged blackjack game, the reference as to the days the game occurred, is stale, thereby negating any probable cause on which a search warrant could be issued. Additionally, the failure of the affidavit to allege the wagering of something of a monetary value mandates a complete lack of probable cause for the issuance of a search warrant.

It becomes even more apparent that there is no probable cause when the Court considers the nature of the activity (a card game), the length of time the activity existed (this is unknown although "several games were played between October 25, 1980, and December 5, 1980"), the nature of the property to be seized (cards, a card shoe and a set of rules) and the place to be searched (the private residence). It is obvious that, taken as a whole, a card game, played several times sometime during a six-week period with a deck of cards, a shoe and a set of rules, is extremely mobile. As such, and with no additional information as to a continuing activity, it is apparent that no probable cause could be shown to exist where a minimum of 77 days passed before the issuance of the search warrant.

CONCLUSION

The Petitioners respectfully submit that on the basis of the facts in this case there was no probable cause at the time the search warrant was issued and that all evidence seized, confiscated and introduced into the trial of this matter should have been suppressed. It is respectfully submitted that this Court should reverse the judgment heretofore rendered and grant the Petitioners a new trial.

Respectfully submitted,



EDWARD C. AIRHART

Suite 200, 440 South Seventh Street
Louisville, Kentucky 40203
(502) 587-0789

Attorney for Petitioners

APPENDIX

APPENDIX A

NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

82-SC-552-DG

CAVE HARDIN and

CECIL HARDIN - - - - - *Movants**v*COMMONWEALTH OF KENTUCKY - - - *Respondent**On Review From Court of Appeals**No. 81-CA-2106-MR**Jefferson Circuit Court No. 81-CR-0200*

MEMORANDUM OPINION AND ORDER

Pursuant to SCR 1.020(1)(a), the Court being equally divided, the decision of the Court of Appeals in this case stands affirmed.

Vance, J., did not sit in the consideration of this matter.

ENTERED July 6, 1983.

(s) Robert F. Stephens
Chief Justice

Counsel for Movants:

EDWARD C. AIRHART

Suite 200, 440 South Seventh Street

Louisville, Kentucky 40203

Counsel for Respondent:

STEVEN L. BESHEAR, AG

EILEEN WALSH, AAG

Capitol Building

Frankfort, Kentucky 40601

APPENDIX B
SUPREME COURT OF KENTUCKY
No. 82-SC-552-DG

CAVE HARDIN and
CECIL HARDIN - - - - - - - *Movants*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

On Review From Court of Appeals
81-CA-2106-MR
Jefferson Circuit Court No. 81-CR-0200

ORDER

Movant's motion for leave to file a belated motion for reconsideration is denied.

ENTERED: August 2, 1983

(s) Robert F. Stephens
Chief Justice

APPENDIX C
THE COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT

CRIMINAL DIVISION

81CR0200-7

February Term A. D., 1981

THE COMMONWEALTH OF KENTUCKY

Against

CAVE HARDIN,
CECIL HARDIN, and
DALE (LAST NAME UNKNOWN)

CONSPIRACY TO PROMOTE GAMBLING (ALL)

KRS 528.040 Class D Felony

1 to 5 years

PROMOTING GAMBLING II (ALL)

KRS 528.030 Class A Misdemeanor

Up to 1 year and/or up to \$500

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge

COUNT ONE

That on or about the 25th day of October through the 5th day of December, 1980, in Jefferson County, Kentucky, the Defendants, Cave Hardin, Cecil Hardin and a third individual, Dale, last name unknown, acting separately or

in complicity with each other, committed the offense of Conspiracy to Promote Gambling when they unlawfully promoted gambling by conspiracy to advance or profit from gambling activity.

COUNT TWO

That on or about the 25th day of October through the 5th day of December, 1980, in Jefferson County, Kentucky, the Defendants, Cave Hardin, Cecil Hardin, and Dale, last name unknown, acting separately or in complicity with each other, committed the offense of Promoting Gambling in the Second-Degree when they knowingly advanced or profited from unlawful gambling activity.

AGAINST THE PEACE AND DIGNITY OF THE
COMMONWEALTH OF KENTUCKY.

A True Bill
(s) Jay Phillips
Acting Foreman

WIT: P. Brooker; V. Noble, KSP; M. Ballard, 1449, LPD

THE COMMONWEALTH OF KENTUCKY

JEFFERSON CIRCUIT COURT
DIVISION 15
JUDGE BENJAMIN SHORE

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

AFFIDAVIT IN SUPPORT of and
PETITION FOR SEARCH WARRANT

Comes the affiant, Det. M. Ballard
a peace officer of the Louisville Division of Police
who personally appeared before the undersigned and being first duly sworn now on
oath deposes, affirms and says that he has and there is reasonable and probable grounds
to believe and affiant does believe that there is now on the premises known and numbered
as 2422 West Market Street, Louisville, Jefferson County, Kentucky
and more particularly described as follows: A 24-story red brick building with a
black roof. The first floor of the building is advertised and known as the
Fireside Tavern. A Coca Cola sign hangs over the front entrance door bearing the
name Fireside Tavern. The area to be searched is the entire first floor that
being the tavern itself. Also to be searched is a second floor apartment located
in the southeast part of the second floor. Entrance to this apartment is reached
by a flight of brown wooden stairs on the outside of the building on the east side.
This is located in Louisville, Jefferson County, Kentucky.

and/or in (a) vehicle(s) described as

and/or on the person(s) of Cecil Hardin, Cave Hardin, and Dale White male, last name
unknown.

the following described personal property, to wit: An electronic bowling machine and
any other gambling paraphernalia.

Affiant states that there is probable and reasonable cause to believe and
affiant does believe that said property constitutes (check appropriate box or boxes)

- () stolen or embezzled property;
- (X) property or things used as the means of committing a crime;
- (X) property or things in the possession of a person who has
intention to use same as means of committing a crime or in
the possession of another to whom any person may have de-
livered it for purpose of concealing it or preventing its
being discovered;
- (X) property or things which consist of evidence which tends to
show that a crime has been committed or that a particular
person has committed a crime.


APPENDIX D

Affiant has been an officer in the above agency for a period of 10 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 18th day of February, 1981, at approximately 9:30 a.m./p.m., affiant received information from/ON 027405 Det. Vince Noble of the Kentucky State Police who appeared with the affiant at the Jefferson County Grand Jury with testimony which led to the indictment an issuance of Criminal Court Bench Warrants for Cecil Hardin, Cave Hardin, and white male Dale, last name unknown, for Conspiracy to Promote Gambling and The Promotion of Gambling in the Second Degree. This indictment was the result of an investigation conducted by Det. Noble and the affiant as a member of the Louisville Police Internal Affairs Unit. A citizens complaint was lodged against Cecil Hardin on June 28, 1980, who at the time was a Louisville police officer by a Kenneth Logsdon of 429 North 25th Street, Louisville, Kentucky. As a result of this complaint gambling allegations were brought against Cecil Hardin. On August 12th, 1980, Det. Noble began an undercover investigation at the request of the affiant into these gambling allegations. And it was on November 14th, 1980 that Cave Hardin took Det. Noble to the upstairs apartment located over the tavern at 2422 West Market, where Det. Noble was told by Cave Hardin that a crap game would be conducted at that location in the near future and proceeded to teach Det. Noble the game of craps so he could participate in that game. Det. Noble was advised by Cave Hardin that a \$2 per hour per player would be charged to participate. The Fireside Tavern is in part owned and operated by Cecil Hardin and Cave Hardin. Det. Noble's investigation revealed that on December 5th, 1980, that a gambling token (a chance on a case of beer) was given to an undercover State Police detective as a result of a score on an electronic bowling machine present in the tavern at 2422 West Market Street, Louisville, Kentucky. Cecil Hardin told Det. Noble that a cash payoff could be received for a higher score on the electronic bowling machine. This occurred in Louisville, Jefferson County, Kentucky.

Acting on the information received, affiant conducted the following independent investigation:
The undercover operation was set up and conducted with the resulting information presented to the Jefferson County Grand Jury and an indictment obtained.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.


Detective M. Ballard

Subscribed and sworn to before me on Friday
this 20 day of Feb., 19 81 at 2:00 a.m./p.m.

Judge, 

Court

JEFFERSON CIRCUIT COURT
DIVISION 15
JUDGE BENJAMIN SHOBE

THE COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT COURT
DIVISION 15
JUDGE BENJAMIN SHOE

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

AFFIDAVIT IN SUPPORT of and
PETITION FOR SEARCH WARRANT

Comes the affiant, Det. M. Ballard
a peace officer of the Louisville Division of Police
who personally appeared before the undersigned and being first duly sworn now on
oath deposes, affirms and says that he has and there is reasonable and probable grounds
to believe and affiant does believe that there is now on the premises known and numbered
as 2420 West Market Street, Louisville, Jefferson County, Kentucky.
and more particularly described as follows: A one-story white frame dwelling
with a light colored roof. The numbers 2420 appear in white numerals to the left
of the front entrance door and directly over a gray mailbox. This is located in
Louisville, Jefferson County, Kentucky.
and/or in (a) vehicle(s) described as

and/or on the person(s) of Cecil Hardin, Cave Hardin and Dale W/M, last name unknown.

the following described personal property, to wit: The posted written rules of the card
game blackjack, playing cards and dealing shoe and any other gambling paraphernalia.

Affiant states that there is probable and reasonable cause to believe and
affiant does believe that said property constitutes (check appropriate box or boxes)

- () stolen or embezzled property;
- (X) property or things used as the means of committing a crime;
- (X) property or things in the possession of a person who has
intention to use same as means of committing a crime or in
the possession of another to whom any person may have de-
livered it for purpose of concealing it or preventing its
being discovered;
- (X) property or things which consist of evidence which tends to
show that a crime has been committed or that a particular
person has committed a crime.

APPENDIX B

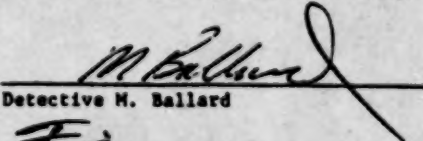
Affiant has been an officer in the above agency for a period of 10 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 18th day of February, 1981, at approximately 9:30 a.m./p.m., affiant received information from ~~Observed~~ Det. Vince Noble of the Kentucky State Police who appeared with the affiant at the Jefferson County Grand Jury with testimony which led to the indictment and issuance of Criminal Court Bench Warrants for Cecil Hardin, Cave Hardin, and white male Dale, last name unknown, for Conspiracy to Promote Gambling and The Promotion of Gambling in the Second Degree. This indictment was the result of an investigation conducted by Det. Noble and the affiant as a member of the Louisville Police Internal Affairs Unit. A citizens complaint was lodged against Cecil Hardin on June 28, 1980, who at the time was a Louisville police officer by a Kenneth Logsdon of 429 North 25th Street, Louisville, Kentucky. As a result of this complaint gambling allegations were brought against Cecil Hardin. On August 12th, 1980, Det. Noble began an undercover investigation at the request of the affiant into these gambling allegations. His investigation continued until approximately December 5, 1980. During this time Det. Noble witnessed and played in the gambling game of Blackjack with house rules posted at 7420 West Market Street, Louisville, Kentucky, with the playing cards dealt from a dealing shoe. This game was operated at several different dates and times between October 25, 1980 and December 5, 1980 during this undercover investigation. This game was operated by Cecil Hardin, Cave Hardin and Dale white male, last name unknown, with Det. Noble playing in the game. This occurred in Louisville, Jefferson County, Kentucky.

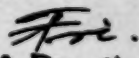
Acting on the information received, affiant conducted the following independent investigation:

The undercover operation was set up and conducted with the resulting information presented to the Jefferson County Grand Jury and an indictment obtained.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.


Detective M. Ballard

Subscribed and sworn to before me on
this 20 day of Feb.


19 81 at 2:00 a.m./p.m.

Judge 

Court

JEFFERSON CIRCUIT COURT
DIVISION 15

APPENDIX F
JEFFERSON CIRCUIT COURT
 7TH DIVISION
 No. 81CR0200

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CAVE HARDIN,
 CECIL HARDIN and
 DALE MEREDITH - - - - - - *Defendants*

MOTION

Come the Defendants, Cave Hardin, Cecil Hardin and Dale Meredith, by Counsel, and move the Court to enter the attached Order.

ORDER

Motion having been made, It Is HEREBY ORDERED that all evidence obtained as the result of the search of the premises at 2420 and 2422 West Market Street, Louisville, Kentucky, on February 20, 1981, be and the same is hereby suppressed.

Judge

Date

EDWARD C. AIRHART

Attorney for Defendants

Suite 200, 440 South 7th Street

Louisville, Kentucky 40203

587-0789

This is to certify that a copy of the Motion and the Order were hand delivered to the Assistant Commonwealth Attorney this ____ day of March, 1981.

EDWARD C. AIRHART

APPENDIX G
JEFFERSON CIRCUIT COURT
SEVENTH DIVISION

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CAVE HARDIN,
 CECIL HARDIN, and
 DALE MEREDITH - - - - - *Defendants*

Indictment No. 81CR200

CHARGES: Conspiracy to Promote Gambling,
 Promoting Gambling II

TRIAL, VERDICT AND JUDGMENT

This 8th day of April, 1981, the defendants, Cave Hardin, Cecil Hardin and Dale Meredith, appeared in open Court with his attorney, Honorable Edward Airhart, and the Commonwealth came by Sarah Weyler, Assistant Commonwealth Attorney.

Thereupon came the following jury, to-wit: Donna Mulhall, Thomas McDaniel, Dennis O'Bryan, John Nugent, Marilyn Miller, Charles Knight, Robert Pullen, Mildred Kastelhun, William Rod, Faye Voyles, Damon Howell, Charles Gast, Willie Summers, and William Thornberry, who were duly empaneled and sworn to hear the case upon the defendant's plea of not guilty.

L. Gaddie, the Official Court Reporter of this Court was directed to record the testimony and proceedings of this trial.

Motions and rulings made during the trial are as shown in the official transcript.

The trial progressed, and after having heard all of the evidence and the Court's instructions, the jury retired to deliberate, and thereafter the jury returned into open Court the following verdict to-wit: on second day of trial April 9, 1981 after jurors, Willie Summers #13 and Charles Knight #6, were stricken by lot: We, the jury, find the defendant, Cave Hardin, not guilty of Conspiracy to Promote Gambling under Instruction No. 1 /s/ William Thornberry, foreman. We, the jury, find the defendant, Cecil Hardin, not guilty of Conspiracy to Promote Gambling under Instruction No. 1, /s/ William Thornberry, foreman. We, the jury, find the defendant, Dale Meredith, not guilty of Conspiracy to Promote Gambling under Instruction No. 1. /s/ William Thornberry, foreman. We, the jury, find the defendant, Cave Hardin, guilty of Second Degree Promoting Gambling under Instruction No. 11a and fix his punishment at confinement in the County Jail for No days/months and/or a fine of \$500.00. /s/ William Thornberry, foreman. We, the jury, find the defendant, Cecil Hardin, guilty of Second Degree Promoting Gambling under Instruction No. 11b and fix his punishment at confinement in the County Jail for no days/months and/or a fine of \$500.00. /s/ William Thornberry, foreman. We, the jury, find the Defendant, Dale Meredith, not guilty of Second Degree Promoting Gambling under Instruction No. 11c. /s/ William Thornberry, foreman.

IT IS THEREFORE ORDERED BY THE COURT that the defendants, Cave Hardin, Cecil Hardin and Dale Meredith, having been found not guilty of Conspiracy to Promote Gambling are hereby acquitted of said charges. Further, the defendant, Dale Meredith, having been found not guilty of Second Degree Promoting Gambling, is hereby acquitted of said charge.

IT IS FURTHER ORDERED BY THE COURT that the defendants, Cave Hardin and Cecil Hardin, are hereby guilty of Second Degree Promoting Gambling and said action is passed to April 30, 1981 at 9:00 a.m. for final disposition. The defendants are to remain on their own recognizance pending said disposition.

ATTESTED: A true copy

PAULIE MILLER: Clerk

By (s) Ann Worland, D.C.

(s) Thomas Burton, Judge

cc: S. Weyler

E. Airhart

ENTERED IN COURT: April 9, 1981

APPENDIX I

OPINION RENDERED: MARCH 26, 1982; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

File No. 81-CA-2106-MR

CAVE HARDIN,
CECIL HARDIN - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

*Appeal from Jefferson Circuit Court
Honorable Thomas Burton, Judge
Civil Action No. 81-CR-0200*

AFFIRMING

BEFORE: COOPER, HOWARD, and VANCE, Judges.

COOPER, Judge. This is an appeal from a judgment convicting the appellants of promoting gambling in the second-degree and fining them \$500.00. The single issue raised on appeal is whether the trial court erred, as a matter of law, in overruling a motion to suppress evidence seized as the result of a search warrant. On review, we affirm.

On February 19, 1981, the appellants, Cave Hardin and Cecil Hardin, together with a third defendant, were charged with conspiracy to promote gambling and with promoting gambling in the second-degree. KRS 528.040; KRS 528.030. On February 20, the Louisville Police Department obtained

search warrants to search a tavern and a one-story residence in Louisville. As a result of the search, they confiscated poker chips, a deck of cards, and other gambling paraphernalia. Thereafter, the appellants filed a motion with the trial court to suppress the evidence on the basis that the information contained in the separate affidavits supporting the search warrants was stale. Specifically, the affidavits stated that between October 25, and December 5, 1980, Detective Noble, an undercover police officer, witnessed and played in a game of black-jack, and in addition, on December 5, another undercover police officer obtained a gambling token on a case of beer. Both affidavits set out that the last occurrence of gambling was on December 5. The affidavits and search warrants were not issued until February 20, 1981, approximately 57 days later. On this basis, the appellants argue that the evidence seized as a result of the search was unlawfully obtained. The trial court overruled a motion to suppress the evidence which was introduced into trial. The appellants were found not guilty of a conspiracy to promote gambling; yet, they were found guilty of promoting gambling in the second-degree and fined \$500.00 each. It is from such conviction and fine that the appellants now appeal.

The single issue raised herein is whether the search warrants were issued without a sufficient showing of probable cause so as to render their execution invalid. The appellants argue that the lapse of time between the time the criminal activity was observed and the time the affidavits and warrants were issued, was so unreasonable that there was no basis for believing the criminal activity still continued to exist. In effect, the appellants argue that a 57-day lapse negated any showing of probable cause. Conversely, the Commonwealth argues that given the nature of the criminal activity involved—a continuing gambling operation—the affidavits furnished reasonable

grounds for believing the activity involved was still in existence. *Robinson v. Commonwealth*, Ky., 550 S. W. 2d 496 (1977). Stated differently, the appellee argues that the warrants were issued with the sufficient showing of probable cause. Reviewing the record below, we agree.

As a general rule, courts will invalidate a search warrant only if there is a showing that an unreasonable amount of time has elapsed between the time the alleged activity has occurred and the time the affidavit and warrants are executed. Consequently, what constitutes a "reasonable amount of time" varies from situation to situation. A year may be declared unreasonable, whereas a week may not. See *Stroud v. Commonwealth*, 295 Ky. 694, 175 S. W. 2d 368 (1943); *Neely v. Commonwealth*, 269 Ky. 451, 107 S. W. 2d 305 (1937); *Boone v. Commonwealth*, 206 Ky. 657, 268 S. W. 2d 286 (1925); and *Neal v. Commonwealth*, 218 Ky. 718, 292 S. W. 314 (1927). See also *Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On*, 100 A.L.R. 2d 525 (1962).

Here, one of the affidavits stated that criminal activity had taken place between October 25, and December 5, 1980. Furthermore, both affidavits stated that the undercover criminal investigation began on August 12 of the same year, following a complaint of gambling activity on June 28, 1980. Consequently, the activity observed by the undercover agents was not isolated, but continuous. Given this fact, we find that the lapse of time between the time the activity was observed and the time the affidavits and warrants were issued was not unreasonable. Cf *State v. Taylor*, 246 A. 2d 898 (Conn. 19). Accordingly, we hold that the trial court acted correctly in overruling the appellants' motion to suppress the evidence. The question of what is and what is not an unreasonable length of time between the time the criminal activity is observed and the time an affidavit and warrant are executed must be de-

terminated by the specific situation involved. As such, we decline to adopt any specific guidelines for determining the question of "reasonableness."

The judgment of the trial court is affirmed.

ALL CONCUR.

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